ONG SEH SEN

v.

PP

HIGH COURT MALAYA, SHAH ALAM
ABANG ISKANDAR ABANG HASHIM JC
[CRIMINAL REVISION NO: 43-16-2007]
28 MAY 2008

CRIMINAL PROCEDURE: *Criminal revision - Review of conviction under s. 4(1) Anti-Money Laundering Act 2001 - Whether there was non-compliance of s. 173(b) Criminal Procedure Code by sessions judge when recording conviction upon guilty plea - Whether applicant could not raise ground on propriety of conviction which he had earlier abandoned at trial - Whether serious injustice caused as to warrant court's exercise of powers of revision - Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd - Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals - PP v. Soon Seng Sia Heng*

This was the applicant's application for revision of the decision of the sessions court judge ('SCJ') against him. The applicant had pleaded guilty on a charge under s. 4(1) of the Anti-Money Laundering Act 2001. The SCJ convicted and sentenced him to two years' imprisonment and imposed a penalty fine of RM1 million or in default 12 months' imprisonment. The applicant's appeal against his sentence and application for stay of execution of sentence was dismissed earlier by this court (see *PP v. Ong Seh Sen* on p 234 of this journal). He had since filed an appeal now pending before the Court of Appeal. The applicant now applied for a revision of the SCJ's decision on the grounds that there was non-compliance of s. 173(b) Criminal Procedure Code ('CPC'). The cases of *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd ('Badiaddin')* and *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals ('Staghorn')* were referred to by the applicant and Deputy Public Prosecutor respectively.

Held (dismissing application for revision):

(1) The cases *Badiaddin* and *Staghorn* were civil cases. There was nothing to suggest that the principles enunciated in those cases applied with equal vigour in criminal matters with respect to the powers of the High Court on revision where the same court

A previously made a final decision that was pending appeal. Notwithstanding, even if the principle enunciated in *Badiaddin* was applicable to criminal cases, the facts in that case was distinguishable from the facts in the present case. However, going by the judgment of Justice Peh in *Badiaddin*'s case
B quoted with approval by CJ Abdul Hamid Mohammad in *Staghorn*'s case, the issue of illegality must be canvassed at the trial or during the appeal. It could not be reserved for future use. The applicant abandoned the ground on the propriety of the conviction during appeal. Afterthought manoeuvres led to
C the application of the *res judicata* rule that debarred the applicant to reappear before the same court objecting to the propriety of the conviction, simply because he could not live with the sentence the SCJ meted out on him pursuant to his own guilty plea. On that score, the instant application failed.
D (paras 12 & 13)

(2) In *PP v. Soon Seng Sia Heng*, the apex court decided that where there was a pending appeal in a criminal case in a higher court, there ought not to be a review or a revision by the same court
E that delivered the order impugned (*Sukma Darmawan Sasmitaat Madja v. PP*; foll). It followed that the instant application would be a non-starter due to the pending appeal in the Court of Appeal. (para 14)

F **(3)** There was nothing to suggest that the applicant was deprived of justice in the manner in which his case was handled by the SCJ. He had an opportunity to review his guilty plea when the case was mentioned on a subsequent date but he decided to maintain it. He indicated to the SCJ that he understood the charge and the consequences of his guilty plea. He admitted to
G the facts of the case and the exhibits tendered by the prosecution to be correct. The SCJ then convicted him on his own guilty plea. His plea in mitigation was a lengthy one and well prepared. There was therefore a clear intention on the applicant's part to plead guilty. In the circumstances, it was not
H seen how and where the SCJ fell into error as alleged by the applicant as not being in compliance with s. 173(b) CPC. On the contrary, there was substantial justice dispensed to the applicant by the SCJ. (para 16)

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(4) The applicant was trying to resurrect a ground he abandoned during his appeal against sentence. In any case, he was barred from appealing against his conviction on his own guilty plea by virtue of s. 305 CPC. (para 18)

(5) It was not the purpose of a criminal revision to become a convenient form of 'backdoor appeal' against conviction for accused persons who pleaded guilty to their charges (*Teo Hee Heng v. PP*; refd). The applicant pleaded guilty to the alternative charge before the SCJ for which he was convicted and he appealed against the sentence which was dismissed. He had since filed an appeal to the Court of Appeal, now pending. With that as a backdrop, he filed the instant application for revision. Looking at the course charted by the applicant and the manner in which he conducted himself in the present case, he was close to being described as an unmeritious applicant. Such circumstances did not merit nor justify the court's exercise of its discretionary powers of revision. (para 18)

Obiter:

(1) The case of *PP v. Soon Seng Sia Heng* was not cited in the arguments and in the judgments of *Badiaddin* and *Staghorn* and that lent credence and supported the view that the latter two decisions did not apply in a criminal revision as in the instant case. (para 14)

Case(s) referred to:

Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(dist)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***

Karamdas v. Sangat Ram AIR [1964] HP 37 ***(refd)***

Koh Thian Huat v. PP [2002] 3 SLR 28 ***(refd)***

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***

Sukma Darmawan Sasmitaat Madja v. PP [2007] 4 CLJ 697 CA ***(foll)***

PP v. Soon Seng Sia Heng & 9 Other Cases [1979] 1 LNS 81 FC ***(refd)***

Teo Hee Heng v. PP [2000] 3 SLR 168 ***(refd)***

Legislation referred to:

Anti Money-Laundering and Anti-Terrorism Financing Act 2001, s. 4(1)

Criminal Procedure Code, ss. 173(b), 294, 305

Rules of the High Court 1980, O. 15 r. 6

Criminal Procedure Code [Ind], s. 482

Other source(s) referred to:
Sohoni's Code Of Criminal Procedure 1973, 20th edn, pp 5227-5228

For the applicant - SK Cheong (Md Yunus with him); M/s SK Cheong
For the prosecution - Budiman Lutfi Mohamed DPP

Reported by Usha Thiagarajah

JUDGMENT

Abang Iskandar Abang Hashim JC:

[1] This has been an application for a revision of the decision of the Sessions Court ('SCJ') sitting at Ampang, convicting this applicant on his own plea of guilty for a charge under s. 4(1) of the Anti Money-Laundering Act 2001 ('AMLA'). He was convicted on his own plea of guilty and having heard the plea in mitigation and the submissions on sentence, he was sentenced by the SCJ to two years imprisonment and imposed a pecuniary order (recoverable as a fine) of RM1 million or in default 12 months imprisonment.

[2] He was not satisfied with the sentence imposed and he had appealed against the same, on the ground that the sentence was manifestly excessive. Before the SCJ and subsequently before me, the applicant had urged that he be released on bond under s. 294 of the Criminal Procedure Code ('CPC'). I had, after hearing submissions from both sides, dismissed his appeal and had affirmed the sentence as imposed by the SCJ. His application for stay of execution of the sentence of imprisonment was also dismissed by me.

[3] He had since filed an appeal against my decision dismissing his appeal against sentence. That appeal is still now pending at the Court of Appeal.

[4] With the appeal still pending in the Court of Appeal, the applicant then filed in this application for me to revise the decision of the SCJ on the ground that there had been a non-compliance by the SCJ of the provisions of s. 173(b) of the Criminal Procedure Code ('CPC') when recording the conviction of the applicant on his own plea.

[5] Looking at this application and its potential ramifications, it has become clear to me that although this has been an application to revise the decision of the Sessions Court, nevertheless since I had disposed off the appeal pertaining to the same matter earlier, this application actually had the collateral effect as an attempt to revise or review my own said decision on the said appeal, if I were to exercise my discretion to revise the decision of the SCJ. A quick peek at the Indian position would reveal that although s. 482 as contained in the Indian Criminal Procedure Code provides for power for a High Court over there to review its own previous decisions, nevertheless, numerous decided cases would tend to show a great sense of reluctance on the part of the Indian courts to invoke such power, except in the rarest of cases, perhaps in the name of putting right what has been a manifest injustice. Even the inherent power of the High Court in India cannot be invoked by a High Court to review its judgment, passed in an appeal on the ground that the High Court had acted illegally in remitting the sentence of fine, as was shown in the case of *Karamdas v. Sangat Ram* AIR [1964] HP 37 at p. 39. (See, generally, *Sohoni's Code Of Criminal Procedure* 1973, 20th edn, at pp. 5227-5228). A perusal into our very own Criminal Procedure Code has also presented with me a revelation, but one of a different kind, namely, there being no such equivalent provisions like those contained under s. 482 of her Indian counterpart. As such, I had invited both parties to address this court on whether I had the necessary power to do what was asked by the applicant, bearing in mind that I had disposed of his appeal against sentence and that his appeal against my decision is at the present moment, still pending before the Court of Appeal.

[6] The crux of En. S.K Cheong, the learned counsel for the applicant's argument has been that, as the SCJ had not complied with s. 173(b) CPC, her conviction against the applicant was therefore illegal. That being so, according to the learned counsel, this court ought to revise that order and set aside the conviction that was recorded by the SCJ. Whilst this court has no issue on its powers of revision generally, nevertheless in the context of this case I was rather apprehensive as to its proper exercise as earlier indicated by me. When I had alluded to him the fact that this court had dealt with his appeal against sentence previously and that my acceding to his client's application would in fact tantamount to a review of my own decision regarding the said appeal, he had

submitted that in the circumstances of this case, this court was fully competent to do just that. He had cited a few cases in support of his contention that this court could revise its own prior decision pertaining to the same case, in a situation which involved the issue of illegality that goes on to impact on jurisdiction. He then submitted that the applicant ought to be allowed to retake his plea afresh.

[7] By necessary implication, the ultimate effect of such an order which was sought after by this applicant would be that, the order of this court that had dismissed his appeal against sentence would automatically be rendered nugatory and by the same token, the appeal that is now pending in the Court of Appeal will die a natural death and will be of no consequence.

[8] The learned deputy had strongly objected to this application and cited a few cases as authorities in support of his stance.

[9] In support of his contention, the learned counsel had relied heavily on the decision in *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 in particular the judgment of Justice Gopal Sri Ram, where the learned Justice had said at p. 113 therein, thus: "… But where an order is made in breach of a statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, **upon the illegality being clearly shown,** to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal." (emphasis added) In the same case, Justice Mohd Azmi FCJ also noted at p. 112 therein, that "It is settled law that one High Court cannot set aside. But there is one special exception … on the ground that the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction."

[10] However, it is interesting to note the speech of Justice Peh Swee Chin FCJ, who in his judgment in the same case, had said at p. 105, thus: "If a party complains of an illegality in a contract, he must plead it … All these … must take place and must have taken place either at the trial of the first instance, or in any direct appeal to a higher court therefrom as the case may be. The court, if it does not deal with the illegality in any way aforesaid, would be

functus officio and cannot take up the point after a judgment had been perfected. Further, a point of illegality could not be reserved by a litigant by a litigant for future use without deploying it at the trial or in an appeal therefrom. A court cannot outside the scope of such trial and such appeal therefrom at any time thereafter take judicial notice of such point pleaded as an afterthought in a later action filed also as an afterthought. *The doctrine of res judicata, it having been based, inter alia, also on the high policy of interest rei publicae ut finis litium, would prevent these afterthoughts.*" (emphasis added)

[11] The learned deputy En. Budiman Lutfi bin Mohamed, had submitted a most recent Federal Court case of *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121 where the learned Chief Justice Abdul Hamid Mohamed CJ had this to say, and I quote: "As a matter of judicial policy, a judge should not be allowed to re-open a case, set aside an earlier judgment or order … *A point of illegality could not be reserved by a litigant for future use* … (citing Justice Peh's speech in *Badiaddin*'s case *(supra)*)." (emphasis added) In the *Staghorn*'s case *(supra)*, his Lordship went on to say that the relevant order in the Rules of the High Court, namely O. 15 r. 6 on the right to intervene in a proceeding must be satisfied, and opined that "Just because the second judge is of the view that that the order of the first judge had caused injustice, it does not mean that the order to intervene should be given." (See p. 125 therein)

[12] One cannot but notice that both those cases have been civil cases. There is nothing in those cases to suggest that the same principle applied with equal vigour as well in the criminal matters with respect to powers of the High Court on revision, in a situation where the same court had previously made a final decision and that an appeal is pending in the Court of Appeal with respect to that same decision.

[13] Be that as it may, even assuming for a moment that the principle enunciated by learned Justices Mohd Azmi FCJ and Gopal Sri Ram JCA, is applicable in criminal cases, with due respect, the facts in *Badiaddin*'s case *(supra)* can be distinguished from the facts of our instant case. In *Badiaddin*'s case *(supra)*, the contract became illegal because the charge over the land, as the collateral was one that contravened the relevant Ordinance. That being so,

A the High Court was not clothed with the necessary jurisdiction to make any sustainable orders arising from the conduct by parties from the proverbial poisoned tree, that was the illegal contract. In that case, Justice Gopal Sri Ram JCA, was of the view that grave injustice would be occasioned if the High Court was not allowed to
B review and set aside its previous order because when that previous order was made, it was in fact wanting in jurisdiction by reason of the fact that the contract had become illegal. Such a situation could be one that was envisaged as a manifest injustice in the Indian courts that might move them to exercise their power to right
C something which was perverse, something that was patently wrong and unjust. In the case before me, this court was competent in all sense of the word when the appeal against the sentence passed by the SCJ and which was dismissed by me. There was nothing illegal *ipso facto* in so far as the decision of the SCJ was concerned. The
D appeal was against sentence, as indeed our CPC only allows for an appeal to be prosecuted in by an accused person who has pleaded guilty only to the extent of the legality of the sentence. The applicant in this case had, during the appeal before me abandoned the ground no. 4 that had related to the alleged impropriety of the
E conviction, as contained in his petition of appeal. On the face of record therefore, there was nothing to render the conviction an illegality or an irregularity. That being the case, there is no established element of illegality that could have adversely impacted on my jurisdiction to dispose off the appeal against sentence. So,
F the principle enunciated by Justice Gopal Sri Ram in *Badiaddin*'s case *(supra)* could not be brought into play here and indeed the facts in this case before me could not be brought into *Badiaddin*'s case *(supra)* legal embrace. It is clear to me that no such illegality exists before me that would have empowered and enabled me to
G embark on the route proposed by the learned counsel as enunciated by the learned Justice Gopal Sri Ram in *Badiaddin*'s case *(supra)*. To my mind, the possibility of this case coming within *Badiaddin*'s legal embrace would depend on the outcome of an exercise of revision by me, the very thing that the applicant was asking me to
H do despite the fact that there is an appeal pending in the Court of Appeal against my decision dismissing his appeal against sentence. Going by the speech by Justice Peh in *Badiaddin*'s case *(supra)* and quoted with approval by Chief Justice Abdul Hamid Mohammad in the *Staghorn*'s case *(supra)* the issue of illegality must be canvassed
I at the trial or during appeal. It could not be reserved for future use.

In our case, it will be recalled that the applicant had abandoned the ground on the propriety of the conviction during appeal, as according to his learned counsel, the applicant had really wanted to plead guilty and to move on in life. This court had then proceeded to consider the appeal entirely on the legality of the sentence. In other words this applicant was willingly and knowingly able to live with a 'less than perfect conviction' at that time, had this court allowed his appeal on sentence and then substitute it with one which would be to his liking. What would that make of his conviction? Could he be heard to subsequently complain on the same ground if the sentence was something which he could not stomach? Justice Peh's concern in the *Badiaddin*'s case *(supra)* on afterthought manoeuvres led him to rule that *res judicata* rule would creep in to debar litigants such as this present applicant before this court, reappearing before the same court with a ready complaint in hand objecting to the propriety of the conviction, simply because he could not bear to live with the sentence which the court below had meted out on him pursuant to his own plea of guilty. On that score, this application should fail.

[14] Then there is another reason why this application ought not be entertained. That reason resides in a decision of our apex court in the case of *PP v. Soon Seng Sia Heng & 9 Other Cases* [1979] 1 LNS 81, where it was held that where there is an appeal pending regarding a criminal matter in a higher court, there ought not to be a review or a revision of the same by the same court which order is being impugned. The principle in this case was cited and applied in a broader sense in the case of *Sukma Darmawan Sasmitaat Madja v. PP* [2007] 4 CLJ 697 by learned Justice Gopal Sri Ram JCA, when he had declined the invitation by the appellant to invoke his power of revision because the learned Justice was cognizant of the fact that "Dato' Seri Anwar Ibrahim has been charged with an offence for the same act." As such His Lordship proceeded on to say at p. 713 "I conclude it is wrong to consider a revision at this point in time. In *PP v. Soon Seng Sia Heng* [1979] 1 LNS 81 FC, it was held that where there is an appeal to the Federal Court, an application by that person for review will be dismissed. A similar principle should apply although the accused in the Criminal Trial 45-52-98 is a different person because both cases arise from the same event, and the truth is best determined in a full trial. I would therefore refrain from undertaking such a course." The facts in the

A case before me had involved the same person (as accused person/ appellant/applicant) and thereby presenting a more compelling rationale for the ratio in *Soon*'s case *(supra)* to apply here in full force. That being the case, it would appear that this application would be a non-starter bearing in mind that there is an appeal
B pending in the Court of Appeal presently. Lest I forget, by way of observation, it is noted that this *Soon*'s case *(supra)* was not cited in the arguments and in the judgments of their Lordships in *Badiaddin*'s case as well as in *Staghorn*'s case, and that fact would, to my mind, lend credence and supports my view that those two
C decisions have no application in a criminal revision situation such as that which obtains in this case. But even if they are indeed applicable to criminal proceedings, I had earlier on deliberated on their effects in the context of the facts obtaining before this court. Either way, to my mind, this applicant could not stand to benefit
D therefrom.

[15] In dealing with this matter of revision, I must also refer to the case of *Koh Thian Huat v. PP* [2002] 3 SLR 28, where the learned Chief Justice Yong Pung How of Singapore, had occasion to
E speak his mind on the powers of revision residing in the High Court, at p. 32, thus: "The powers of revision are not meant to cater to the whims of convicted persons who at a later stage change their plea. Ultimately, the High Court's revisionary powers are to facilitate its supervisory and superintending jurisdiction over criminal
F proceedings before a subordinate court so as to correct, if necessary, a miscarriage of justice arising from the correctness, legality or propriety of any finding, sentence or order recorded or passed, and also as to the regularity of any proceedings of that court." So, it is clear that the power of revision is a supervisory power that had been
G given by the Legislature to the High Court to ensure that no miscarriage of justice is occasioned to any party in the administration of justice in the subordinate courts. Suffice to say that similar statutory provisions exist in Malaysia as those existing in Singapore. As such, the speech by the learned Chief Justice
H Yong would be as good as if it had been uttered by one of our Justices here in Malaysia on the said powers of revision residing in the Malaysian High Courts Justices. Perhaps it is also opportune for me to refer to the case of *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163, where Justice Abdul Hamid Omar
I CJ (Malaya) (as he then was), had occasion to remark that the

power of revision should only be used sparingly and that it should be used to correct any miscarriage of justice. A revisionary power is not concerned with strict legal compliance but it is intended to be used to ensure that substantial justice had been done. It being discretionary in nature, and exercisable at the instance of the court, parties are not at liberty to demand as of right, unlike in an appeal.

[16] Assuming for a moment that this court ought to revise the decision of the SCJ in the exercise of my discretion, having looked at the records of proceedings in the court below there is nothing to even suggest that the applicant had been deprived of justice in the manner in which his case was handled by the SCJ. The records would show he had pleaded guilty to the alternative charge in this case when the said alternative charge was preferred against him and when the case was again mentioned on a subsequent date, he had decided to maintain his plea of guilty. In other words, he had had the opportunity to review his plea and he had apparently decided to stick by it the second time of asking. He had indicated to the SCJ that he had understood the charge and the consequences of pleading guilty. He had admitted to the facts of the case and the exhibits tendered by the Prosecution, to be correct. Then and only then did the SCJ convict him on his own plea of guilty. I have failed to see how and where had the SCJ fallen into error as was alleged by the applicant, as being not in compliance with s. 173(b) CPC. His plea in mitigation by his counsel before the SCJ was a lengthy one, one that was well prepared before hand, as opposed to one that was done off-the-cuff or done impromptu. There was therefore a clear intention on the part of the applicant to plead guilty. This pattern was again seen in the appeal proceedings before me where his then learned counsel, Dato' Sukri Mohamad, had indicated to this court that he had been instructed by the applicant to abandon his contention regarding the propriety of the conviction entered against him as contained therein appearing as ground no. 4 in his petition of appeal. The learned counsel further told this court that the applicant had really wanted to plead guilty as he wanted to move on with his life. He then reiterated his plea for a most lenient sentence such as a binding-over under s. 294 CPC or a mere fine. Suffice to say here that I had dealt with this matter when I had dismissed the same. Taken in its totality, there had been substantial justice dispensed to this applicant by the court below, and I cannot, for the life of me, after looking at the notes of proceedings, even pretend to entertain that the opposite had been the case.

[17] This whole episode had also acutely reminded me of the words of Chief Justice Yong in the said *Kho*'s case *(supra)* which I must reproduce here for its full impact: "The High Court must therefore jealously guard its revisionary jurisdiction from being abused by frivolous and unmeritious applications. The revisionary powers should never be misused as an avenue for litigants to commence a backdoor appeal."

[18] To my mind, the application by this applicant must have been actuated by his dissatisfaction with the fact that he was imposed a sentence which he could not live with. He was consistent in his submission in the lower court as well as before me that he was pleading for a bound-over order under s. 294 CPC or a fine, at worse. It is to be noted that during his appeal before me, his learned counsel had indicated to this court that this applicant was abandoning ground no. 4 in his petition which had purportedly challenged the propriety of the conviction, because he really wanted to plead guilty to the charge. Since he failed to get what he had expected, this applicant had, by engaging his present learned counsel, been trying to retract his plea of guilty by alleging irregularity in the recording of his plea of guilty by the SCJ. It has come to the fore that he is now trying to resurrect a ground that he had abandoned during his appeal against sentence. In any case, he would be barred from appealing against his conviction on his own plea of guilty by virtue of s. 305 CPC. Still, he could have urged this court to invoke its discretion to revise the conviction since it had come to be in the 'cognisance' of this court. What had since become apparently clear as well is the fact that he was blowing hot and cold at his whim and fancy. I do not believe that this court ought to accede to and appease his present desire to retract his plea of guilty. In the case of *Teo Hee Heng v. PP* [2000] 3 SLR 168, the court had said: "It is certainly not the purpose of a criminal revision to become a convenient form of 'backdoor appeal' against conviction for accused persons who had pleaded guilty to their charges." In this case, this applicant had pleaded guilty to the alternative charge before the SCJ for which he had been convicted, he had appealed against such sentence which was dismissed by me, he had since filed an appeal to the Court of Appeal therefrom which is now pending and with these as a backdrop, he had filed this application for revision. Looking at the course that had been charted by this applicant and in the manner

in which he had 'conducted' himself in this case, he was very close to fulfil what Chief Justice Yong had described as an unmeritious applicant. Such circumstances to my mind do not merit nor could they justify this court in exercising its discretionary powers of revision.

[19] Such being the case, I would dismiss this application to revise the decision of the SCJ, for the reasons as alluded to above by me.